Oakland Mall, Ltd. and Sears, Roebuck and Co. *and* Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

Macomb Mall Associates, a Limited Partnership and Sears, Roebuck and Co. *and* Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 7–CA–28367 and 7–CA–28446

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 2, 1989, Administrative Law Judge Michael O. Miller issued the attached decision. Respondent Macomb Mall Associates filed exceptions and a supporting brief, Respondent Sears, Roebuck and Company filed exceptions and supporting arguments, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The judge found, inter alia, and we affirm, that Respondent Sears (Sears) violated Section 8(a)(1) of the Act by demanding that the Union cease or refrain from engaging in protected nonemployee customer boycott handbilling, aimed solely at Sears' customers and conducted on its property at the entrances to its Oakland Mall and Macomb Mall stores.[3]

Our colleague finds that Sears did not unlawfully deny the Union access to its property, essentially on the grounds that the General Counsel has not established that the Union lacked reasonable alternative means of communicating its message to Sears customers.[4]

Our colleague focuses on the fact that the Union did not actually attempt to handbill automobile traffic as it passed in front of the malls on the surrounding roadways and heavily traveled, 30- to 40-mile-per-hour divided thoroughfares surrounding the malls, or as that traffic turned from those roadways and thoroughfares and entered the mall parking lots. Thus, in contending that Sears lawfully prohibited the Union from engaging in handbilling on its property at the mall locations in question, our colleague relies on the absence of affirmative evidence of failed handbilling, at the perimeters of the malls, that would have conclusively established in our colleague's eyes that such perimeter handbilling could not have been effectively and safely carried on.

But it is well settled that, in showing that ostensible alternative means of reaching an audience are *not* reasonable alternatives, the General Counsel is not necessarily required to show that the party engaging in the Section 7 conduct *actually* attempted those alternative means and found them futile.[5] All that is required is a clear showing, based on objective considerations, that reasonably effective alternative means were not available in the circumstances.[6] We find, in agreement with the judge and for the reasons fully discussed by him, that the General Counsel has made such a showing here.[7]

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Sec. 7 activity engaged in by the Union was ''at the very least'' as protected as the Sec. 7 activity engaged in by the union in *Jean Country*, 291 NLRB 11 (1988), which the judge incorrectly identified as ''area standards'' activity.

In adopting the judge's finding that Respondent Macomb Mall violated the Act, we also note Union Organizer Lowran's credited testimony that he attempted and was unable to obtain insurance on behalf of the Union conforming to Sears' demands.

[3] The Union's primary dispute was with Ryder DPD (not a party to this proceeding). Ryder previously had a contract with Sears under which Ryder provided home delivery services to Sears. Ryder had employed about 80 to 100 driver employees to perform this contract, who had been represented by the Union. Sears subsequently canceled its home delivery services contract with Ryder, and Ryder in turn laid off the 80 to 100 driver employees. The Union handbilled the Sears stores in question in an attempt to get customer sympathy and support for the Union's efforts to get it to reinstate Ryder for home delivery services. The handbills themselves requested customers not to shop at Sears, advised them that Sears no longer used a company (not identified) that employed union members to deliver Sears merchandise, informed them that 100 union members had lost their jobs as a result of Sears no longer using that company, and asked for the customers' help in getting the employees' jobs back. The handbillers were mostly former Ryder employees. None were employees of Sears.

[4] Although our colleague asserts that the judge ascribed undue *weight* to the Union's Sec. 7 rights, he nevertheless does acknowledge that the Union's conduct is, in the final analysis, protected by the Act. Thus, the fundamental disagreement between our colleague and us is over the consequences of the Union's failure actually to attempt to handbill from the perimeter locations to which it had been relegated.

[5] *Jean Country*, 291 NLRB 11, 13 (1988).

[6] Id. See also *Target Stores*, 300 NLRB 964 fn. 2, 970 (1990); *Best Co.*, 293 NLRB 845 (1989).

[7] The cases relied on by our colleague in this context are inapposite. *Providence Hospital*, 285 NLRB 320 (1987), involved, in relevant part, the reasonableness of *picketing*, not handbilling, near a busy highway. In *Skaggs Cos.*, 285 NLRB 360 (1987), the Board found that as a reasonable alternative to handbilling on the shopping center's parking lot in front of the primary employer's private store, the union reasonably could have communicated its area standards message to the public by ''handbilling *and picketing*'' (emphasis added), on the public sidewalk around the perimeter of the shopping center's property. In the instant case, however, as both the judge and our colleague recognize, *picketing* (as opposed to handbilling) to convey the Union's secondary consumer boycott message would have subjected the Union to an unfair labor practice charge. In any event, even in *Skaggs*, the Board expressly noted that the union would *not* necessarily have to show that it actually attempted and failed to communicate its message from the public sidewalk in order to *disprove* the reasonableness of that alternative. Also in *Skaggs*, the Board noted that there was no evidence that two other roads servicing the shopping center were not reasonable alternative means to the union's access to the respondent's property. In *L & L Shop Rite*, 285 NLRB 1036 (1987), the record established that the union actually had handbilled *and picketed* automobiles from the sidewalk adjacent to the public roads surrounding the shopping center, and the Board found that handbilling at that location ''would *supplement*

Thus, we fully endorse—and see no need to restate or set forth here—the judge's thorough analysis of the ''reasonable alternative means'' aspect of this case (set forth in secs. II,B,4; II,C,5; and II,D,4 of his attached decision.[8] Consequently, we affirm the judge's well-reasoned finding that the Union had no reasonable alternative means to handbilling at Sears store entrances, on or (in the case of Sears mall entrance at Macomb Mall) immediately adjacent to Sears' property, to communicate its message.[9]

Finally, we note that our decision herein compels no relinquishment of property rights. It directs only an *accommodation* of the recognized private property rights of Sears with the equally recognizable Section 7 rights of the Union. *Jean Country*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Sears, Roebuck and Co., Troy and Roseville, Michigan; Macomb Mall Associates, Roseville, Michigan; and Oakland Mall, Ltd., Troy, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting.

Unlike my colleagues, I conclude Sears did not unlawfully deny the Union access to its property. In my view the General Counsel has failed to meet his burden under *NLRB v. Babcock & Wilcox Co.*,[1] of proving that the Union lacked reasonable alternative means of communicating with customers of Sears. Consequently, I find that the Union's right to engage in lawful secondary handbilling need not be accommodated at the expense of the Respondent's property rights.

The Union's primary dispute is with Ryder DPD, which laid off trucking employees represented by the Union after Sears canceled its contract with Ryder for home delivery services in July 1988. Sears replaced Ryder with Leaseway Trucking, which had no contract with the Union, and which hired only a few of the laid-off Ryder employees. The Union responded with a handbilling campaign directed at Sears' customers at the Oakland and Macomb Malls in Troy and Roseville, Michigan, respectively. The handbills, which urged Sears to reinstate the Ryder contract to win back members' jobs, contained the following message:

> ATTENTION SHOPPERS
>
> PLEASE do not shop at this . . .
>
> Sears & Roebuck Store!
>
> Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.
>
> As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our members need your help to get their jobs back.
>
> Thank you. . .
>
> Teamsters Local No. 243

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the Union's picketing as a means to convey its message.'' Id. at 1039 (emphasis added). Again, in the instant case picketing to convey the Union's message is not a lawful alternative. Finally, in *Homart Development Corp*., 286 NLRB 714 (1987), the unions engaged in secondary handbilling at a shopping mall (Fiesta Mall) housing a department store which was utilizing a nonunion general contractor and subcontractors to build an additional store at another mall (Westridge Shopping Mall). Testimonial opinions varied about the relative safety of handbilling at the highway entrances to the Fiesta Mall. But beyond the controversial evidence of handbilling safety in *Homart*, the unions were able to effectively handbill at one public property entrance to Fiesta Mall for approximately 1 month. Almost immediately thereafter, the unions began communicating their message by picketing at the Westridge Shopping Mall where the general contractor and subcontractors were actually constructing the new store. Further, the pertinent principle of *Jean Country*, supra—which issued after *Homart*—remains unchallenged and is applicable to the instant case: the General Counsel is not necessarily required to show that the party engaging in Sec. 7 conduct actually attempted alternative means of communication in order to establish their futility.

Thus, while it might be true, as our colleague suggests, that the ''best'' way to determine the efficacy of an alternative means of communication is to attempt it, it is clearly not the *only* way, and, more importantly for the purposes of our decision herein, it is certainly not, under the Act, the necessarily *required* way.

[8] We do, however, note particularly that the judge found, inter alia, that the distribution of handbills to passing automobiles from the public easements around the perimeter of Oakland and Macomb Malls, and from the traffic medians and ''jughandles'' in the thoroughfares abutting the malls, would have been both fruitless and dangerous because of the speed of the traffic. We agree with the judge's assessment of these circumstances. See *Sentry Markets*, 296 NLRB 40 (1989), enfd. 914 F.2d 113 (7th Cir. 1990); *W. S. Butterfield Theatres*, 292 NLRB 30 (1988).

[9] In reaching this result, we note our colleague's assertion that ''a union is held to a higher standard'' in attempting to establish an absence of reasonable alternative means to access to the property of a secondary employer. Our colleague's reliance on *Hardee's Food Systems*, 294 NLRB 642 (1989) and *Federated Department Stores*, 294 NLRB 650 (1989) as support for this assertion is unavailing on two counts. First, that assertion is neither expressed nor implied in either of those cases. Second, neither case is apposite to the situation presented in the instant case.

In *Hardee's*, the secondary handbilling which Hardee's lawfully prohibited on its private property was conducted at its three Terre Haute, Indiana stores. These stores were *15 miles* from Hardee's Brazil, Indiana store that was the actual situs of the union's primary dispute with Hardee's nonunion contractor, who was at that time engaged in construction work only at the Brazil store, and not at the Terre Haute stores. Indeed, at the same time that the union was being *prohibited* by Hardee's from engaging in secondary handbilling at the three stores in Terre Haute, where the primary employer was not even present, the union was being *permitted* by Hardee's to engage in continued primary handbilling of Hardee's nonunion contractor at the Brazil store itself, where the contractor was presently working.

In the instant case, by way of contrast with *Hardee's*, the secondary handbilling which Sears has unlawfully prohibited at its Oakland Mall and Macomb Mall stores was being conducted at what the judge has aptly characterized as ''the fulcrum of the dispute, Sears, whose actions, directly or indirectly, brought about [the union members'] unemployment and could similarly bring about their re-employment.''

In *Federated Department Stores*, the secondary handbilling which Richway lawfully prohibited at its Palm Beach Lakes and Military Trails stores did not even *commence* until *after* the primary employers (Richway's nonunion construction contractors) had completely finished their work on the Palm Beach Lakes and Military Trails projects and had gone from those jobsites. Indeed, the union in *Federated Department Stores* apparently made no effort to engage in primary or secondary handbilling or picketing at any location where the primary employer contractors were actually engaged in their work.

In the instant case, in sharp contrast to *Federated Department Stores*, Sears' merchandise sold at both its Oakland Mall and Macomb Mall stores was being delivered to customers by Sears' nonunion replacement for Ryder *during* the same time period that the Union was attempting to engage in its secondary handbilling *at* those stores—''the fulcrum of the dispute.''

[1] 351 U.S. 105 (1956).

In addition to distributing the handbills, the former Ryder employees asked customers to speak on their behalf to Sears management.

Both handbilling locations are in enclosed malls. Sears occupies Oakland Mall along with three other major department stores, 140 specialty shops, and common areas with trees, plants, and benches. Sears is the largest store in the mall. There is one entrance to Sears from inside the mall, and eight entrances with double or quadruple doors from the sidewalk surrounding Sears. Sears owns, provides security for, and pays taxes on its own building and surrounding sidewalks, the area adjacent to the mall entrance 12 feet into the mall, and the parking lot adjacent to the store. No-solicitation/no-distribution signs are posted to the nonmall entrances, and these rules have largely been enforced. Sixty-five percent of Sears customers enter the mall through two of the five car entrances, and the remaining customers use the three other entrances. A hard-surfaced public easement 15 to 20 feet wide and maintained by the city of Roseville, Michigan, surrounds the mall.

On August 2, 1988, Union Organizer Thomas Ziembovic and six laid-off Ryder employees distributed handbills at the mall entrance to Sears and at two of the exterior entrances. Sears Operations Manager Marshall Dyke requested that the handbillers leave the mall entrance and, when they moved to two parking lot entrances, that they leave those entrances as well. When the latter request was ignored, Dyke called the police. The police arrived and ordered the handbillers off Sears property. The police told the handbillers that they could handbill on the easement around the property, but that if they obstructed traffic or disobeyed police orders they would be arrested. Mall officials also denied Ziembovic's request for permission to handbill at the Sears entrance to the mall.

Macomb Mall, which is also enclosed, consists of a Sears store, 2 or 3 smaller department stores, and 90 specialty shops. Sears owns and controls the property from its mall entrance to the easements surrounding its parking lot. Twenty percent of the Sears shoppers use the mall entrance; 80 percent use exterior doors. There are also uniformly enforced no-solicitation/no-distribution signs.

On August 9, 1988, the Union distributed handbills at all three exterior entrances to Sears' Macomb Mall store as well as at the mall entrance to Sears. At the direction of a Sears supervisor, two handbillers at the customer service parking lot entrance were told that the police would be called. The handbillers left. Handbillers at other entrances refused to leave, however. When Sears called the police and the police told the handbillers that they would be arrested, the handbillers left. Union Business Representative Gregory Lowran asked the police where the Union could handbill and was directed to the public easement. The police told Lowran that, if the handbillers went off the easement and onto the street, they would be arrested for obstructing traffic.

The Union did not attempt to handbill at Oakland Mall at the public easement around the parking lots, the public easement portion of the medians in entrances off the main road adjacent to the mall parking lots, or the median strips and jughandles on either of the adjoining roads. Nor did the Union attempt to handbill at Macomb Mall from the public easement to which it had been directed by the police, or the median strips of the abutting roads.

My colleagues adopt the judge's finding that the Respondent's property interest must yield at both handbilling sites to accommodate the Union's right to communicate its message to the public. In my view, the judge's analysis is flawed. First, he ascribes undue weight to the Union's Section 7 rights. Second, he holds the General Counsel to a much too lax a standard in meeting his burden of showing there were no reasonable alternative means of communicating the Union's message.

While the judge acknowledged that the Section 7 right exercised here is ''not at the stronger end of the 'spectrum' of Section 7 rights,'' he erroneously compared the Union's interest both to ''struck product'' consumer handbilling, which, according to the Supreme Court's decision in *NLRB v. Fruit Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), is permissible under the Act, and to area standards handbilling, found worthy of protection against substantial impairment in *Jean Country*, 291 NLRB 11 (1988). Neither comparison is apposite. In *Tree Fruits*, the Supreme Court distinguished the consumer-directed publicity, which it there found to be protected when ''employed only to persuade customers not to buy the struck product [where] the union's appeal is closely confined to the primary dispute,'' from ''consumer picketing . . . employed to persuade customers not to trade at all with the secondary employer [where] the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally.'' 377 U.S. at 72. Here, as in the latter situation, the Union's handbills plainly urged customers to stop shopping at Sears' stores. The Union thus ''create[d] a separate dispute with the secondary employer.'' Id. Nor is the Union's activity strictly analogous to picketing in *Jean Country*, where the Union's immediate goal was to persuade potential customers not to patronize the primary employer, the nonunion store it was picketing.

The Union's dispute is with Ryder DPD, which laid off its employees after its contract with Sears for delivery services had been canceled. Because the handbilling is directed not at Ryder, but at a secondary

employer, Sears, its status on the spectrum of Section 7 rights is weak. It is conduct that is lawful only because its medium is handbilling rather than picketing.[2]

The secondary nature of the Union's conduct has significance also in evaluating the extent to which the General Counsel has met his burden of proving that the Union lacked reasonable alternative means of communicating with the public. A union is held to a higher standard before we may compel its entry onto the property of a secondary employer.[3] Here, the judge grounded his finding that the Union lacked adequate alternatives on (1) the speed of traffic on the roads surrounding the malls and the lack of traffic lights at some entrances; (2) difficulties in reaching drivers with handbills where handbillers were necessarily stationed on the passenger side of vehicles, and drivers would be unable to accept literature even if the cars could come to a complete stop and had car windows open; (3) the handbillers' risk of arrest for obstructing traffic by standing in median strips or jughandles at parking lot entrances; (4) the handbillers' inability to distinguish Sears shoppers from others entering the malls; and (5) the risk of enmeshment of neutral employers also located in the malls.

I am not persuaded that these obstacles so impeded the Union's ability to deliver its message that they justify compelling Sears to relinquish its property rights. First, the speed limits on the highways surrounding the malls are no greater than those in effect at other businesses where the Board has found forced access to property unwarranted.[4] Second, the General Counsel offered no evidence that drivers without passengers were so prevalent at the parking lot entrances to the malls that it was impractical for the Union to try to deliver handbills to cars through the passenger windows. In the absence of that evidence, it has not been established that passengers, who are less prone to distraction than drivers entering the malls, do not offer the Union the necessary ''reasonable'' opportunity to convey its message from the perimeter of the malls.

Especially in view of the weak Section 7 interest at issue in this case, I am not persuaded that the Union has not had a reasonable opportunity to communicate with its audience. Perhaps some of the factors enumerated by the judge would have contributed to a less-than-100-percent acceptance rate among customers of Sears entering the mall parking lots by car. Even Board access orders, however, do not guarantee that any percentage of the public will accept handbills. They provide only for a reasonable opportunity to get the Union's message across.[5] In *Greyhound Lines*, 284 NLRB 1138 (1987), for example, a union was lawfully denied access to the interior of a bus terminal to picket and handbill customers of a restaurant enclosed within the terminal, where the vast number—but not all—of the restaurant patrons were off-the-street customers who could be reached from outside the terminal.[6]

Further, it is not known on this record what measure of success the Union might have had if it had attempted to handbill at driveway entrances. The law may not require a union to attempt unreasonable alternative means of communication, but perimeter handbilling is certainly among ''[t]he usual methods of imparting'' the type of information the union seeks to convey to the public.[7] It has been established, for example, in a shopping center situation, that a driveway entrance heavily congested with traffic might create some degree of traffic backup, but not so great as to cause the police to intervene to ensure public safety.[8]

Here, the Union has not made a record of tried-and-failed attempts at handbilling the entrances to the two malls to meet its alternative-means burden under *Babcock & Wilcox*. Thus, it has failed to justify its claim to access to the Respondent's private property.[9] Without such a record, and in view of the weak nature of the Union's Section 7 interest, I cannot join my colleagues in compelling access to the Respondent's private property.

[2] See *Edward J. Debartolo Corp. v. Florida Building Trades Council*, 485 U.S. 568 (1988).

[3] Thus, when a union has both a primary and secondary target at numerous locations, the Board examines whether the union can effectively communicate its protest against the *primary* employer before demanding access to establishments having a more remote connection to the primary dispute. See, e.g., *Hardee's Food Systems*, 294 NLRB 642, 643–644 (1989); *Federated Department Stores*, 294 NLRB 650, 652 (1989). In this case, try as my colleagues may to cast Sears as the ''fulcrum'' of this dispute, Ryder is, as they acknowledge, the primary, and Sears is plainly a secondary employer.

[4] See, e.g., *Providence Hospital*, 285 NLRB 320 (1987) (45 m.p.h.); *Homart Development Corp.*, 286 NLRB 714 (1987) (40 m.p.h.); *Skaggs Co.*, 285 NLRB 360 (1987) (35 m.p.h.).

[5] *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (6th Cir. 1990) (Judge Torruella dissenting).

[6] See also *L & L Shop Rite*, 285 NLRB 1036, 1039 (1987), in which the Board noted that ''[a]lthough only between 5 percent and 25 percent of the motorists entering paused to accept handbills, at least those desiring to receive the handbills had a reasonable opportunity to do so.''

[7] *Babcock & Wilcox*, 351 U.S. at 113.

[8] See *L & L Shop Rite*, supra at 1039.

[9] See *Farah Mfg. Corp.*, 187 NLRB 601, 617 (1970), enfd. 450 F.2d 942 (5th Cir. 1971) (''One would think that the best way to determine the efficacy of such an effort [at alternative means of communication] would be to make it.'').

Tinamarie Pappas, Esq., for the General Counsel.
Douglas A. Witters, Esq. (Clark, Hardy, Lewis, Pollard & Page, P.C.), of Birmingham, Michigan, for Respondent Oakland Mall, Ltd.
Peter B. Kupelian, Esq. (Tucker & Rolf), of Southfield, Michigan, for Respondent Macomb Mall Associates,
Hy Bear, Esq., of Chicago, Illinois, for Respondent Sears, Roebuck and Co.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heard in Detroit, Michigan on Janu-

ary 25, 26, and 27, 1989, based on unfair labor practice charges filed on August 18, and September 9, 1988, by Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), complaints issued by the Regional Director of Region 7 of the National Labor Relations Board (the Board), on September 27, and October 24, 1988, and an order consolidating cases which issued on October 26, 1988. The complaints allege that Oakland Mall, Ltd., Macomb Mall Associates, a Limited Partnership, and Sears, Roebuck and Co. (individually referred to as Oakland Mall, Macomb Mall, Sears, and collectively as Respondents), prohibited the Union from engaging in handbilling activities on property owned by each of them, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondents' timely filed answers deny the commission of any unfair labor practices.

All parties were afforded the opportunity to examine and cross-examine witnesses, introduce evidence, argue orally, and submit posthearing briefs. Briefs were submitted on behalf of all parties.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. THE EMPLOYERS' BUSINESSES AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Oakland Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Troy, Michigan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Troy, Michigan place of business, goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Oakland Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Macomb Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Roseville, Michigan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Roseville, Michigan place of business, goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Macomb Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sears, a New York corporation, is engaged in the retail sale and distribution of clothing, household goods, appliances and related items at its stores which are located throughout the United States, including stores in Troy and Roseville, Michigan, the only facilities involved in the instant proceedings. In the course and conduct of its business operations at each of the Michigan stores involved herein, it annually derives gross revenues in excess of $500,000, and annually purchases and receives goods and materials valued in excess of $50,000 which were shipped directly from points located outside the State of Michigan. Sears admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondents have stipulated, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background—The Union's Dispute and Object*

For a number of years, Sears had a contract with Ryder DPD to provide home delivery services. Ryder's 80 to 100 employees were represented by the Union. When Sears cancelled its contract with Ryder in July of 1988,[2] retaining Leaseway Trucking in its place, the Ryder employees were laid off. Leaseway hired only a few of those employees and has no agreement with the Union.

In August, the Union decided to handbill the Sears stores in the Oakland and Macomb Malls in an effort to win customer sympathy and support for its efforts to get Sears to reinstate Ryder and thereby return its members to the jobs which they had lost. The handbill, distributed on each instance described hereafter, read:

ATTENTION SHOPPERS

PLEASE do not shop at this . . . Sears & Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our members need your help to get their jobs back.

THANK YOU . . .
TEAMSTERS LOCAL NO. 243

In each instance, the handbillers were instructed not to roam about or prevent anyone from entering the store, to be polite and to tell anyone who asked that they were trying to get their jobs back. There is no evidence in this record that the handbilling was conducted in any way inconsistent with these instructions. While the handbills asked shoppers to refrain from shopping in the Sears' stores, the Union witnesses professed to be asking customers to speak on their behalf with Sears' management. The handbillers, who were, for the most part, former Ryder employees, were given no instructions regarding their presence on, or avoidance of, private property.

The handbilling was directed solely at Sears' customers; there was no attempt to organize or otherwise reach the employees of Sears, Oakland Mall, or Macomb Mall, whether unionized or not. Neither of the Malls was involved in the underlying dispute. There were no signs or sandwich boards used and there was no picketing.

B. *Sears and Oakland Mall*

1. The properties

Oakland Mall is located at the junction of 14 Mile and John R Roads in Troy, Michigan, just off of Interstate 75. It is an enclosed mall, consisting of three major department

[1] The unopposed motions to correct the transcript are granted.

[2] All dates hereinafter are 1988 unless otherwise specified.

stores, Sears, Pennys, and Hudsons, located at the ends of wide, street-like aisles, complete with trees, plants and benches. About 140 smaller specialty shops line the aisles. Sears, the largest store in the mall, was built before the mall as a free standing store and is now joined at the mall's eastern wall. There is a single wide entrance into Sears from the inside of the mall on the ground floor. There are also approximately eight entrances, consisting of either double or quadruple doors, into the various departments from the sidewalk surrounding Sears. Sears owns, provides security for, and pays taxes on its own building, the sidewalks around it, the area adjacent to the mall entrance extending 12 feet into the mall, and the parking lot adjacent to the Sears store, extending at least several hundred feet, to the public easement between the parking lot and the roads.

While there are no signs or other markings indicating the ownership or the property lines, there are no-solicitation signs at each of the Sears entrances. Those signs, consistent with Sears' policies, read:

NOTICE TO THE PUBLIC

SOLICITATION OR DISTRIBUTION OF HANDBILLS—CIRCULARS, ETC. PROHIBITED ON THESE PREMISES WITHOUT PRIOR PERMISSION.

SEARS ROEBUCK AND CO.

Pursuant to this policy, Sears at Oakland Mall has not permitted any solicitations, even for charitable purposes, except for a limited number of Christmas bell ringers, to be conducted on its property.

Surrounding the mall are parking lots; the portion owned and maintained by Sears has a capacity of more than 3000 cars, the portion owned and maintained by Oakland Mall has space for about 8800 cars. Abutting the parking lots are public easements, paved or grass-covered, which are between 12 and 20 feet wide. Both 14 Mile and John R Roads are heavily traveled, divided thoroughfares, six and four lanes respectively, with 40-mile-per-hour speed limits.

Along 14 Mile Road, to Oakland Mall's south, there are two entrances to the parking lots. The easternmost entrance, designated entrance number 1, follows the property line between Sears and the mall. It serves both lots and is used by customers going to either the mall in general or Sears in particular. It is the most convenient entrance for customers approaching Sears from 14 Mile Road. Overhead is a sign pointing to Sears with no designation of the mall or other stores on it. There does not appear to be a median strip, on either public or private property, in the center of that entrance driveway. There is a narrowing of the median strip on 14 Mile Road, referred to as a ''jughandle,'' and a traffic light to facilitate east bound traffic in crossing the west bound lane to enter the parking lot at entrance number 1. To the west is an entrance to the mall parking lot, with a sign identifying Oakland Mall, Sears and Hudsons, used by customers destined for any of the stores. At the junction of 14 Mile and John R Roads there is a pylon sign, identifying Oakland Mall, Sears, Hudsons and Pennys.

Along John R, which runs north and south, there are five entrances to the parking lots. Four of these enter into Sears' property. Only the southern (number 2) and northern (number 5) entrances have median strips, small portions (8 feet) of which extend into public property. There is a traffic light at entrance number 2, and a jughandle which can accommodate about 10 cars. There are also two buses which stop along John R, at entrance number 2, and another which enters the parking lot and stops at the Pennys store.

Most (approximately 65 percent) automotive traffic enters the Sears' parking lots through entrance number 1, along 14 Mile Road, and entrance number 2, off of John R. The remainder of the traffic is fairly well distributed among the other three entrances. Sears does not prohibit persons intending to shop at other stores in the mall from using its parking lot or the entrances thereto; neither does Oakland Mall prohibit Sears' customers from using its parking lot and its entrances.

About 80 percent of Sears' customers enter that store through the exterior doors; the remainder enter from the mall. Some customers destined for other stores in the mall enter and cross through Sears. Sears contends that most of its customers are ''single item shoppers'' who come to the mall solely to shop at Sears, entering and using the parking lots nearest the Sears department in which they intend to shop.

Sears and Oakland Mall are open for all but 3 days a year; Sears' hours are slightly longer than those of the mall stores but, when Sears is open, customers can enter the mall through Sears' mall entrance.

2. Attempts to handbill Sears at Oakland Mall

On August 2, Thomas Ziembovic, an organizer for the Union, together with about six laid-off Ryder employees, began handbilling at the Sears at Oakland Mall. Handbillers were stationed at the mall entrance, the entrance from the parking lot to the women's department and by the entrance to the service department; all were on Sears' property. At about 2 p.m., Marshall Dyke, Sears' operating manager for that store, was directed by his unit manager to determine if there were handbillers and solicitors at the store's entrances. He proceeded to the mall entrance where he encountered two persons passing out the Union's handbill. He told them that this activity was not allowed and that they were on Sears' property. They left, stating that they had not realized it was Sears' property.[3]

Dyke proceeded through the store to the women's department, observing handbills that customers had placed on the cash registers and end caps. He found three men handbilling at the women's department entrance and, when he told them that their conduct was not permitted, was referred to Ziembovic. He repeated his admonition to cease the distribution, referring to Sears' no-solicitation rule, and threatened to call the police if they did not leave. Ziembovic told him ''to do what he had to do'' and the handbilling continued.

About 1 or 2 hours later, the Troy police arrived. They spoke with Dyke and accompanied him to where Ziembovic and the Ryder employees were handbilling. At Dyke's request, the police ordered Ziembovic and the employees to

[3] Ziembovic testified that there was no handbilling at the mall entrance; Dyke, however, observed handbillers there and ordered them off of the property. I credit Dyke who had no reason to fabricate this testimony. With six or more employees handbilling different points around Sears, it is distinctly possible that some of them chose, on their own and without Ziembovic's knowledge, to handbill at the mall entrance. It appears, from subsequent events, that they did not tell Ziembovic of their confrontation with Dyke.

leave Sears' property. When Ziembovic stated that they wanted to continue handbilling, the police officer replied that they could handbill at the easement around the property. However, Ziembovic was told that if they obstructed traffic or refused to follow police orders, they would be arrested.

3. Attempts to handbill in Oakland Mall

About mid-afternoon on August 2, Ziembovic, accompanied by one of the Ryder employees, went to the Oakland Mall office where he spoke with Don Pyden, mall manager. He told Pyden that the Union wanted to handbill Sears' customers at the entrance to Sears from the mall. According to Ziembovic, Pyden refused his request, stating that the Union could handbill at any of the Sears exterior entrances, those being Sears' property, but could not handbill anywhere in the mall, including the area around the mall entrance, which, he erroneously claimed, was mall property. He allegedly threatened to call the police if the Union handbilled on the mall's private property. And, although Ziembovic did not express any interest in placing handbills on cars in the parking lots, Pyden allegedly added that the Union was not to do so because it would cause littering.

Pyden claimed to have merely said that, ''I would rather he would not . . . pass out handbills,'' denying that he had refused permission to do so and denying that he made any reference to the parking lots. Pyden testified that he had no authority over Sears property within the mall; however, he did not tell the Union that Sears was the owner of the first 12 feet outside its mall entrance. The Union made no further effort to handbill at the mall entrance.

Some time thereafter, Ziembovic called Douglas Mossman, one of the mall's principals, and repeated his request to handbill at Sears' mall entrance. According to Ziembovic, Mossman refused his request, stating that Sears owned its own property but not identifying the property line as being within the mall. He also rejected Ziembovic's query about placing handbills on cars in the parking lot, allegedly stating that he would make sure they ended up on the ground, constituting littering.

Like Pyden, Mossman claimed to have told Ziembovic that he only preferred that the Union not handbill on mall property. He further claimed to have identified the Sears' property line and to have stated that the Union could handbill on Sears property and could distribute its handbills in the mall's parking lot as long as the handbills were not left on car windshields, where they would cause a littering problem.[4]

Notwithstanding that General Counsel failed to call the employee who had accompanied Ziembovic to Pyden's office to corroborate Ziembovic's testimony, I am inclined to credit his recollection as against both Pyden and Mossman. It is not plausible that a union which was serious enough about a dispute to prepare a handbill, bring employees together to distribute it, continue its distribution on Sears' property even when ordered off and seek permission to make that distribution on what it believed to be mall property would have refrained from doing so had it merely been told, ''We would rather you didn't.'' Given such noncommittal answers as Pyden and Mossman claimed, Ziembovic would have gone ahead with the distribution. That he refrained from doing so, in the circumstances of this case, evidences that he was ordered not to do so.

On August 10, the Union wrote both Pyden and Douglas Mossman, ''requesting permission to handbill at the Sears' entrances at the Oakland Mall.'' Neither letter was answered. Both Mossman and Pyden testified that they did not reply because they interpretted the letter to be seeking permission to handbill on Sears' property, not Oakland Mall's.

4. The Union's alternatives

The Union did not return to handbill at the Oakland Mall Sears after August 2. Neither did it attempt, on that or any other day, to distribute its handbill from the public easement around the parking lots, the public easement portion of the medians in entrances numbers two and five off of John R Road or the median strips and jughandles on 14 Mile or John R Roads, areas which Respondent Sears contends are suitable for the Union's distribution.

In addition to the speed of the traffic around the Mall making distributions at the roads ineffective or dangerous, Ziembovic pointed out that a person attempting to pass out literature from the easements along the adjacent roads would be on the passenger side of any passing car, making it virtually impossible to hand a leaflet to a driver even if the car slowed down and the window was open. Standing on the median in those roads, or on the jughandles, might enable a distributor to reach a driver who had slowed or stopped to turn into the mall but risked arrest for obstructing traffic, as threatened by the police. Similarly, an attempted distribution from the medians in entrances numbers two and five would have required a distributor to stand within approximately 8 feet of public easement and would have required a driver to stop immediately upon turning into the driveway in order to accept a handbill, thus risking an accident for himself and posing a risk of arrest for the distributor. Moreover, if it had attempted to make its distribution from this point, or from the medians, jughandles and easements which were in, alongside of or at the junction of the two roads, where charitable solicitations have taken place, the Union would not have been able to distinguish between those shoppers going to Sears and those going elsewhere.

C. *Sears and Macomb Mall*

1. The properties

Macomb Mall is located in Roseville, Michigan, bounded by Masonic Boulevard on the south, Beaconsfield on the west, and Gratiot Avenue on the east. Gratiot is a divided multilane thoroughfare, with a 35-mile-per-hour speed limit, with one entrance into Sears' parking lot just north of the junction of Gratiot and Masonic. There is a traffic light and jughandle at that entrance. Two additional entrances to the mall's parking lot, further away from the Sears store, also come off of Gratiot. There are three entrances to the Sears parking lot off of Masonic, a 30-mile-per-hour roadway, none of which are protected by traffic lights, and two off of Beaconsfield, one of which enters upon the Sears lot and another which goes into the mall's lot further north. There are bus stops in the mall parking lots and another along Gratiot. About 40 percent of drivers heading into the Sears lot use the first entrance on Gratiot with the balance divided roughly

[4] That Mossman took the telephone call from Ziembovic at his office located at some distance from the mall, rather than at the mall as alleged in the complaint, is irrelevant and not a material variance from the pleadings.

evenly among the other entrances. The mall is surrounded by a public easement, 15 to 20 feet wide and hard surfaced, which is maintained by the city.

Macomb Mall consists of an enclosed structure of approximately 940,000 square feet, surrounded by acres of parking lot. Sears, the largest store in Macomb Mall, and the mall itself, were built and opened for business simultaneously. In addition to Sears, the mall contains 1 or 2 smaller department stores and about 90 specialty shops, occupying leased space. The department stores are at the ends of the mall's street-like aisles along which are the specialty shops.

The entire mall, including Sears, is open to the public 362 days a year, for substantial portions of each day. Sears hours are slightly longer than those of the other stores in the mall.

Sears owns and controls the property on which it sits, from the mall entrance to the easements around its parking lot. Sears' parking lot holds about 1500 cars and, according to Sears' witnesses, Sears shoppers tend to be single item shoppers who park and enter nearest the department in which they intend to shop. Macomb Mall's parking lot holds about 4600 cars. Sears shoppers are not precluded from parking in the Mall's lot and entering the mall through any of its doors. Conversely, customers for other stores may park in Sears' lot and enter through Sears.

About 20 percent of Sears customers enter that store from the mall. The remainder enter from the sidewalk around Sears through doors into the various departments. These entrances vary from single door width at the automotive department, to double doors into the catalogue, optical/financial, and sporting goods departments, with a four-door-wide entrance to the women's wear department. The mall entrance is wide enough for several people to enter or leave, side by side.

2. No-solicitation rules

As at Oakland Mall, Sears has a no-solicitation rule in effect at Macomb Mall and signs, identical to those at Oakland Mall, are posted at each entrance. At the time of these events, several of the permanent signs may have come down and been replaced by temporary signs in the vestibules. Sears rigidly enforces this rule at Macomb Mall, not even allowing Christmas bell-ringers on its property.

Macomb Mall also has a policy with respect to nontenant activities, including solicitations, petitioning, and vending. That policy requires that an interested organization first complete an application describing the activity, sign both a ''Hold Harmless & Indemnification Agreement'' and an agreement to abide by the rules established for such activities, and provide a certificate of insurance establishing that Macomb Mall has been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. Similar insurance is required of the mall tenants. After meeting these requirements, numerous organizations have held shows, exhibits, and fundraisers in the mall.

Sheldon Peven, Macomb Mall's insurance consultant, reviews the Mall's insurance requirements and the policies provided under it. He testified that he deems this to be an advisable practice for the Mall, one which the Mall has historically required, in order to protect the mall and its tenants from liability arising from accidents and altercations. In addition to securing insurance coverage, Macomb Mall uses the application procedure to schedule events and avoid conflicts. The policy has uniformly been required of all outside groups, including those making charitable solicitations or educational presentations.

3. Handbilling at Sears at Macomb Mall

The Union began handbilling Sears at Macomb Mall on August 9. The handbilling continued on the morning of August 10, with handbillers at the interior mall entrance and at exterior entrances on all three sides of the Sears store. The handbilling at the customer service entrance, one of the busier doors, was observed by the store's manager, Gary Crawford, who directed Margaret Lauretti, the loss prevention supervisor, to exclude them. She told the two men at that door that they were on private property and would have to leave or the police would be called. They left. However, when similar instructions were given to handbillers at other doors, they refused to leave. Sears called the local police and the handbillers left when ordered to do so under threat of arrest. The Union returned about September 7 and resumed handbilling at the mall entrance and at several of the exterior doors. Once again, Sears' supervisors or managers ordered them to vacate Sears' property and called the police when the handbillers refused. The police, threatening arrest, ordered them to leave and the Union complied.

When ordered by the police to leave Sears' property, Gregory Lowran, the Union's business representative, asked where their activity would be permissible. He was told that they could go to the easements around the property. However, the police told him, if the handbillers went off the easement and handbilled in the street, they would be arrested for obstructing traffic. The Union left and has not attempted to handbill at Sears in Macomb Mall since early September.

4. Handbilling in Macomb Mall

As noted above, the Union commenced its handbilling activity at the Sears store in Macomb Mall on August 9, with several handbillers on mall property at the Sears entrance and others on Sears' property outside the Mall. During the course of that activity, the handbillers who had been at the mall entrance were told to stop their distribution. They called Lowran and reported that someone from the Mall had said they needed permission in order to continue. He directed them to disregard the order and continue, which they did for a brief period longer, until they ran out of bills.

Upon hearing from the handbillers, Lowran called Macomb Mall's office. Speaking with Janet Lewis, secretary to mall manager Nancy Lamphear, he asked whether permission was required to handbill in Macomb Mall. According to Lowran, she replied that he would have to send Lamphear a letter stating the Union's request. On August 10, Arthur Brown, one of the former Ryder employees, delivered a letter to the office, ''requesting permission to handbill all the Sears' entrances at the Macomb Mall.'' When he delivered it, he was told about an insurance requirement.[5] Brown called Lowran and related what he had been told about insurance.

[5] It is immaterial whether he delivered the envelope to Nancy Lamphear, as he testified he had done, or to Janet Lewis or Debbie Eavers as Lamphear's testimony would indicate. All three had authority to order the Union not to handbill without completing the Mall's application requirements.

Lowran immediately called the Mall's office and was told by Lewis that the Union could not handbill until it completed the application form and gave the Mall proof of a $1 million insurance policy. He asked to speak to someone higher up and was referred to Joe Thomas, property manager for Shostak Bros., managing agent for Macomb Mall. Lowran next received a call from his handbillers, reporting that the police had come, ordered them off the property and prohibited them from placing their bills on cars in the parking lot. Lowran told them to comply with the police orders in order to avoid arrest.

Lowran called Thomas on August 10 or 11, asserted the Union's right to handbill and questioned the insurance requirement. Thomas explained that everyone coming into the Mall to sell, display, or solicit was required to complete the application form and have a $1 million liability policy. If they fulfilled these conditions, Thomas stated, the Union could distribute its handbills and place them on cars in the parking lot. On August 11, Lowran received a set of Macomb Mall's application forms. At some point, he also received a small sheet of blue paper, detailing the insurance requirements at levels one-half of what he had been told was required.[6]

Lowran made several calls to union officers and to the Union's insurance representative and, he testified, was unable to secure the necessary insurance. He was told that no such insurance was available.[7] On August 26, he submitted the completed application, together with the signed regulations and the ''Hold Harmless Agreement.'' He did not submit proof of the required insurance.

The Union's last attempt to handbill at Macomb Mall occurred on approximately September 7. Ryder employee Brown handbilled in the Mall at the Sears entrance for about 1-1/2 hours. He left when the police came. On that same date, Lowran was ordered to stop handbilling by a Macomb Mall security officer and by personnel in the Mall's office. He was also given another application package and it was made clear to him that the Union could handbill and place the handbills on cars in the parking lot if the entire application procedure, including the insurance requirement, was satisfied.

5. The Union's alternatives

According to Gary Crawford, Sears' store manager at Macomb Mall, most Sears shoppers enter the store to purchase a single item, parking closest to the department carrying that item. Moreover, he testified, 40 percent of Sears shoppers at Macomb Mall enter the parking lot at the first driveway off of Gratiot where both north and south bound cars can turn in. Crawford also testified that he has observed charitable solicitations being made from the easement around the parking lots. Thus, he contended, that easement afforded ample opportunity for the Union to distribute its handbill without entering upon Sears' property.

The Union did not attempt to handbill from the easement or the medians in the abutting roads. They did not do so, Lowran testified, because the police had threatened them with arrest if they went into the roadways and obstructed traffic. Additionally, he noted, a handbiller standing on the easement would be on the passenger side of any passing car, the traffic was heavy and moved at high speeds, and a car containing a Sears customer could not be distinguished from one containing shoppers destined for other stores.

D. *Analysis*

1. The analytical framework

In *Fairmont Hotel*, 282 NLRB 139 (1986), the Board had announced a new test for access cases. Pursuant to that test, the strength of the Section 7 rights being claimed would be weighed against the strength of the property right involved, with the stronger right prevailing. Only where those rights were relatively equal in strength would the availability of alternative means of communication become determinative. In *Jean Country*, 291 NLRB 11 (l988), the Board considered relevant precedent and its experience under *Fairmont* and held that the ''availability of reasonable alternative means of communication must be considered in every access case, in conjunction with a consideration of the Section 7 rights and the property rights involved.'' *Target Stores*, 292 NLRB 933, 934 (1989).

In *Jean Country*, the Board noted that its essential concern in all access cases will be ''the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted.'' Mountain Country Food Store, 292 NLRB 967 (1988). It identified numerous factors relevant to assessing the relative weights of the competing rights and the availability of alternative means.

Thus, the Board noted that included among the factors relevant to weighing the property rights are ''the use to which the property is put, the restrictions, if any, imposed on public access to the property, and the property's relative size and openness.'' ''[D]enial of access,'' the Board stated, ''will more likely be found unlawful when property is open to the general public than when a more private character has been maintained.''

Relevant to consideration of the Section 7 right, the Board held, is ''the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning Section 7 rights are directed, and the manner in which the activity related to that right is carried out.''

Finally, the Board noted that ''the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and most significantly, the extent to which exclusive use of nontrespassory alternatives would dilute the effective-

[6] Macomb Mall's representatives testified that, while the written instructions only required a $500,000 liability policy, it was their practice to orally state that $1 million coverage was required.

[7] Peven, the Mall's insurance consultant, testified in response to the administrative law judge's questions that a liability policy such as the Union might carry would generally cover its entire operation. The Union should have been able to get the necessary rider or certificate covering a third party for a fairly nominal cost, at least if the activity was to last for only a few days. Most insurance agents, he said, would be aware of the procedure. It was conceivable, he acknowledged, that the Union's policy might not provide such coverage. In that case, a separate policy would be more expensive. No other witnesses with any experience in the insurance industry were proffered by any of the parties.

ness of the message'' are among the factors to be considered in evaluating alternative means.

These factors are, to a certain extent, interdependent, and a given factor may be relevant to more than one inquiry. ''[T]here is no simple formula . . . .'' *Jean Country*, supra at 14.

2. The property rights

a. *Sears*

Sears, as owner of its own properties, unquestionably has legitimate property interests. In furtherance of those interests, the properties are posted against solicitations and distributions and Sears enforces those restrictions as against virtually all those who would engage in such activities. The nondiscriminatory enforcement of such rules tends to make Sears' property interests more substantial that those of a similarly situated retail enterprise without any restrictions. *Target Stores*, supra.

However, since Sears maintains large stores surrounded by sidewalks for the use of the general public, invites the general public to enter upon its property through any of a number of adequately sized entrances, whether to shop, browse the merchandise or simply to pass through on the way to other stores, and permits anyone to drive through its ample, open parking lots from multiple unrestricted entrances and park thereon, whether shopping at Sears or elsewhere in the malls, its property interests are less substantial than those of an employer in a more private nonretail setting. *Target Stores*, id. at 935. Cf. *L & L Shop Rite*, 285 NLRB 1036 (1987), where a supermarket in a small shopping center, sharing the parking lot with several other stores, but imposing no restrictions on access to the parking lot or the sidewalk in front of its store, was held to have only a limited, relatively modest, property right. But cf. *Sisters Chicken & Biscuits*, 285 NLRB 796 (1987), where the owner of a free standing single facility with its own parking lot provided for the convenience of its customers was held to have a substantial private property interest.

b. *Oakland Mall*

Like Sears, Oakland Mall has established a legitimate property interest in the mall and surrounding parking lot. Its property right, however, is a relatively weak one. Thus, the Mall covers a large area, consists of approximately 140 stores, and is open to the public 7 days per week for substantial portions of each day. With wide, tree and bench lined walkways, numerous entrances, ample parking and other public access, it is intended to attract and attracts large numbers of people each day; indeed, the success of the retail enterprises to whom it leases space is dependent upon it doing so. There is no evidence that Oakland Mall imposes restrictions upon the use of the property; no reference was made, either when the Union sought permission to handbill or at hearing, to any no-solicitation or no-distribution rules. As in *Jean Country*, the mall has intentionally been given certain quasi-public characteristics which ''tend to lessen the private nature of the property, because it is apparent that the public is extended a broad invitation to come on the property, and not necessarily with the specific purpose of purchasing a particular product or service.''

c. *Macomb Mall*

The only distinctions between Macomb and Oakland Malls are Macomb Mall's nondiscriminatory maintenance of a requirement that exhibitors, solicitors and the like complete an application, sign ''hold harmless'' agreements and provide proof of substantial insurance designating the mall as an additional insured party, and the evidence that Macomb Mall has permitted a wide range of outside nonretail activities to occur in the Mall. In all these characteristics, Macomb Mall operates in essentially the same manner as Brook Shopping Center, the mall in which *Jean Country* was located. The Board found Brook to have only a weak property right; Macomb Mall's is no stronger.

3. The Section 7 right

The Union's handbilling was directed at Sears' customers, not its employees, and had no organizational objectives. Neither did it purport to protest any unfair labor practice by Sears or to apply economic pressure upon Sears or any other employer with whom it was engaged in ongoing collective bargaining. It was not, therefore, primary union activity constituting a core Section 7 right. *See Sears Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *W. S. Butterfield Theatres*, 292 NLRB 30, 32–33 (1988).

On the other hand, the handbilling was directed at securing the reemployment of the Union's members and the handbilling sought to apply pressure at the fulcrum of the dispute, Sears, whose actions, directly or indirectly, brought about their unemployment and could similarly bring about their reemployment. It was somewhat akin to the ''struck product'' consumer handbilling recognized by the Supreme Court in *NLRB v. Fruit Packers Local 760*, 377 U.S. 58 (1964), as a protected activity and found by the Board in *Mountain Country Food Store*, supra, to be a relatively strong Section 7 right. At the very least, such handbilling stands on the same footing as the area standards activity involved in both *Jean Country* and *Target Stores*, not at the stronger end of the ''spectrum'' of Section 7 rights, but most certainly valid Section 7 rights, worthy of protection against substantial impairment. Moreover, those members whose jobs were at stake personally participated in the handbilling and the handbillers were limited in number, peaceful and unobstructive. By handbilling at the entrances to Sears, they remained in close proximity to Sears' customers so that it can be said that ''the Union could not have more carefully restricted its activities to reach the intended audience while not disturbing others.'' *Target Stores*, supra at 935. Nothing the handbillers did diminished the strength of their Section 7 right.

4. The Union's alternatives

Turning finally to the third factor in the equation, I must conclude that, contrary to the contentions of Respondent Sears, the Union had no reasonable alternatives, under the circumstances, to conducting its handbilling at the Sears' entrances, on Sears' property or on the property of Macomb Mall, immediately adjacent to the Sears entrance.

Sears suggests that the Union could have handbilled from the public easements around its properties, particularly at the driveway entrances. Had they done so with any hope of

being at all effective, the handbillers would have been required to step into the street to deliver their message to the drivers' sides of the cars and would simultaneously have required most of those drivers to at least slow down to receive the handbill. Given the prevailing speed limits and the amount of traffic the surrounding roads carry, this would have posed both a serious safety hazard at virtually all of the points where the activity would have had to take place and a very real risk of arrest for obstruction of traffic, as the Union was expressly warned by the police at each mall.

Had the handbillers refrained from stepping into the streets, they would have been unable to reach most cars, at least from the public easements, as they would have been standing on the passenger side of any passing vehicle. They would also have been unable to explain their situation to potential Sears shoppers, rendering their message less effective. In this regard, I note that the Union's message was fairly detailed, certainly more complex that ''nonunion'' or ''on strike,'' and required some explication by the handbillers. Moreover, even assuming that the message was readily understandable by reading the handbill, the Union could not have communicated it to passing motorists from a picket sign placed on the periphery of the property without substantial fear that it would have been subjected to unfair labor practice charges.

Sears shoppers may, indeed, be single item shoppers and 65 percent of them at Oakland Mall may enter through entrances numbers one and two, off of 14 Mile and John R, respectively. However, entrance number one is the property line between Sears and the Oakland Mall and clearly would be a main entrance for mall shoppers as well as those destined for Sears. Even if the Union could safely, effectively and without fear of arrest have handbilled from public property abutting those two entrances (all of which is doubtful), it would have been unable to communicate verbally with the shoppers and would have missed 35 percent of the auto traffic going into Sears as well as the 20 percent which enters through the Mall, substantially diluting its message. It would also have enmeshed a substantial number of mall shoppers in the dispute.

Similarly, had the Union sought to handbill from public property alongside the two busiest entrances to Sears at Macomb Mall, it would have reached, at best, 40 percent of the cars entering the Sears' lots, missing 60 percent plus all those customers (20 percent) who enter from the mall. It would also have been unable to distinguish Sears shoppers from those going elsewhere in the mall and would, necessarily have enmeshed mall shoppers in its dispute.

The Union did not attempt to handbill from the public easements surrounding each of the malls. It was not required to attempt that which simple observation and common sense indicates would be, as I find, both fruitless and dangerous. *Emery Realty Inc. v. NLRB*, 863 F.2d 1259 (6th Cir. 1988).

E. *Conclusions*

1. Sears

Sears' property interests are not insubstantial; they are less than those of an employer in a more private nonretail setting but somewhat greater than those of a shopping center occupant who has not posted his own property with no-solicitation rules. Here, those interests are balanced against similarly substantial Section 7 rights and the absence of reasonable alternative means for the Union to exercise those protected rights. Applying the *Jean Country* analysis, I must conclude that those property interests are required to yield to the extent necessary to permit the Union's peaceful, limited, and unobstructive handbilling at the mall and other store entrances. Sears refusal to permit such handbilling on its property, I find, violates Section 8(a)(1) of the Act.

2. Oakland Mall

Oakland Mall contends that, even if I find (as I have) that it refused to allow the Union to handbill on its property, no violation can be found inasmuch as the Union had a reasonable alternative for effective communication, handbilling within the bounds of Sears' property both at the mall entrance and outside Sears' store.

I would find this argument persuasive if the Sears property was clearly marked instead of being held out as mall property, if the Mall's representatives had made clear where that property line was, and if the Union had not been threatened with arrest for handbilling on Sears' property. The key under *Jean Country*, id. at 14, is a the ''availability of a reasonably effective alternative means'' of communication. Given the lack of a clear delineation of property lines and Sears' refusal, albeit unlawful, to allow handbilling on its property, I must find that, at that time, the Union had no reasonably effective alternative avenues of communication to the Sears customers other than handbilling on Oakland Mall's property in the vicinity of the mall entrance to Sears.[8] Accordingly, I find that by rejecting the Union's request for permission to handbill at the Sears entrance in the mall, Respondent Oakland Mall violated Section 8(a)(1) of the Act.

Oakland Mall also rejected, or at least strongly discouraged, the Union from placing handbills on the windshields of cars on its parking lots. Given that these lots were not adjacent to the Sears store, that far more mall customers than Sears shoppers would be the recipients of such a distribution, that the ''Don't Shop at Sears'' message would reach shoppers on their way out, when it would be less effective than if it had been received before the shopping was completed, and given the anticipatable littering problem, I do not find this prohibition to have been unlawful.

3. Macomb Mall

Respondent Macomb Mall asserts that it did not prohibit the Union from handbilling. Rather, it merely insisted that before the Union do so, it meet the standards nondiscriminatorily applied to all nontenant events. This, it argues, it had a right to do in the interests of providing a shopping environment conducive to shopper interest and comfort and protecting third parties from potential injury by outside entities.

General Counsel points out that, as noted above, Brook Shopping Center in which Jean Country was located had a similar requirement. In the context of seeking to limit union picketing in the event that it was to be determined that Jean

[8] If my Order with respect to Respondent Sears is ultimately upheld and compliance therewith is secured, or if Sears voluntarily concedes the Union's right to handbill on its property, the fact that Sears owns 12 feet of property into the mall from which the handbilling could take place might obviate Oakland Mall's obligation to permit the Union's presence on its property.

Country and Brook had committed unfair labor practices by prohibiting the union's picketing in the mall, Jean Country requested that the Union be required to post maintenance and insurance bonds before resuming picketing. The Board denied Jean Country's request, stating:

> Respondent Jean Country additionally requested that the Union be required to post maintenance and liability insurance bonds prior to picketing in the mall, implicitly relating the conduct of the Union's picketing to the conduct of the annual charity and arts and crafts fairs . . . We see a significant difference between the fairs, where between 40 and 75 tables are set up for the sale of merchandise and raffle tickets, and the limited picketing in this case. We also note the absence of any reasonable supporting rationale offered by the Respondent for restraining Sec. 7 activity in this way, and we can conceive of none. Accordingly, we deny the Respondent's request. [*Jean Country*, supra at 19 fn. 21.]

This conclusion is at least equally applicable to the instant situation where the Union sought to engage in handbilling, a less confrontational activity than picketing. I note, in this regard, that most of the events held at the mall during 1988 and subjected to the insurance requirement involved shows, displays, information centers, merchandise sales, and fund solicitations, all appearing to involve more people, blocking of the aisles and equipment than the Union's handbilling.

Similarly, I note that while Macomb Mall's insurance consultant recommended and approved of the Mall's requirements, no substantial justification was offered. The possibility someone might trip over a handbiller or become so incensed that he or she would start a fight is remote, not significantly greater than the risk of similar incidents occurring between any two shoppers in the mall. Neither such remote risks nor the mall's desire to create a serene setting for the mall tenants' commercial enterprises, warrants such a burden[9] being imposed upon the exercise of Section 7 rights, particularly in light of Macomb Mall's relatively weak property interest. Accordingly, I find that by prohibiting the Union from handbilling at the Sears entrance in Macomb Mall unless it adduced proof of insurance coverage naming Macomb Mall as an insured party, Macomb Mall has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By demanding that the Union cease or refrain from engaging in protected handbilling activity on their properties, and by threatening them with arrest if the handbilling activities continued Respondents Sears and Oakland Mall have violated Section 8(a)(1) of the Act.

2. By imposing unreasonable restrictions on the Union's handbilling activities on its property, Respondent Macomb Mall has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondents have not violated the Act in any other manner alleged in the complaints.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondents, Sears, Roebuck and Company, of Troy and Roseville, Michigan, Macomb Mall Associates, a limited partnership, of Roseville, Michigan, and Oakland Mall, Ltd., of Troy, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully handbilling at the entrances to the Sears, Roebuck and Company stores in the Oakland Mall and Macomb Mall, in Troy and Roseville, Michigan, respectively, or imposing unreasonable burdens upon the Union's exercise of its right to engage in peaceful handbilling at those locations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respondent Sears, Roebuck and Company shall post at its stores in Oakland Mall and Macomb Mall copies of the attached notice marked ''Appendix A.'' Respondent Oakland Mall shall post at its office in Oakland Mall copies of the attached notice marked ''Appendix B.'' Respondent Macomb Mall shall post at its office in Macomb Mall copies of the notice marked ''Appendix C.''[11] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by each Respondent's authorized representative, shall be posted by each Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[9] I am satisfied that the Union made an adequate effort to comply with the Mall's insurance requirement and found it burdensome. I do not believe that it can be required to engage in lengthy, fruitless and/or expensive searches for the coverage demanded as a condition of exercising statutory rights.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully engaging in protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store, by threatening them with arrest if they remain on the property of Sears, Roebuck and Co., or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

SEARS, ROEBUCK AND CO.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from engaging in peaceful protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store in Oakland Mall, by threatening them with arrest if they remain on the property of Oakland Mall, or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

OAKLAND MALL, LTD.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by the notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully engaging in the protected concerted activity of distributing handbills at the mall entrance to the Sears, Roebuck and Co. store by demanding proof of liability insurance or by insisting that they leave the premises if they do not provide proof of such insurance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

MACOMB MALL ASSOCIATES, A LIMITED PARTNERSHIP